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No. 03-724

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE INTERNATIONAL CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs, five foreign companies that purchased goods outside the United States from other foreign companies, may pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce.

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Amicus curiae The International Chamber of Commerce ("ICC") respectfully submits this brief in support of Petitioners, with the written consent of the parties.[1]

1. Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its counsel, or its members made a monetary contribution to this brief.

INTEREST OF THE AMICUS CURIAE

Amicus curiae ICC and its members have a vital interest in the issues raised by Petitioners.

The ICC is the world business organization representing thousands of companies, chambers of commerce and business associations in 130 countries. Its mission is to promote multilateral trade among nations in the interest of global prosperity and peace. Among other functions, the ICC promotes voluntary rules governing the conduct of business across borders that are observed in countless thousands of transactions every day; provides essential trade-related services such as the ICC International Court of Arbitration, the world's leading arbitral institution; and consults on issues of international trade for the United Nations and its specialized agencies. Business leaders and experts drawn from the ICC membership establish business stances on broad issues of trade and investment policy as well as on vital technical and sectoral subjects.

The decision of the Court in this case is likely to have far-reaching repercussions for *amicus* and its members in the daily conduct of their business. The question of whether purely non-U.S. transactions, involving no U.S. buyers or sellers, could be subject to the antitrust jurisdiction of U.S. courts in civil actions—and thus the possibility of wide-ranging civil discovery, use of the class action mechanism, and the imposition of treble damages—is of critical importance to businesses engaging in international trade. Until recently, it seemed beyond question that U.S. antitrust laws would have no application to transactions not having the requisite anticompetitive effects on U.S. commerce. If, however, the Court upholds the decision of the Court of

Appeals, international businesses will have to rethink completely their manner of doing business and their potential exposure under U.S. antitrust law, even though the U.S. market is not involved in the transactions in question—without any clear and simple guidelines for doing so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The international business community, including *amicus* and its members, is deeply troubled by the expansive approach to extraterritorial U.S. antitrust jurisdiction adopted by the Court of Appeals in this case, as well as the similar holding by the Court of Appeals for the Second Circuit in *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002). That approach would, in essence, subject virtually every transaction in an allegedly "international" industry to the regulation of United States laws and courts—no matter where that transaction took place, regardless of the nationality of the seller and purchaser, and regardless whether another inconsistent, or even conflicting, competition regime also applied to the same business transaction. For non-U.S. businesses in particular, most of whom have never expected U.S. antitrust laws to apply to their wholly foreign transactions and would need to invest considerable resources in researching and understanding the implications of those laws, this approach, if endorsed by this Court, would impose burdens, and a level of complexity and uncertainty, of unprecedented scope.

The Court of Appeals' interpretation of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA"), holds that if a plaintiff alleges that a *single* person—even one whose claims are not before the court—could assert a "claim" arising from a "direct, substantial, and

reasonably foreseeable effect" on U.S. domestic or foreign commerce, *any person* alleging injury from *any transaction* in *any market* throughout the world can bring suit in U.S. courts, under U.S. antitrust laws, so long as their purported injuries arise from the same "conduct"—a term given broad construction by the Court of Appeals and by Respondents.[2]

Amicus wishes to provide the Court with its perspective on how this incorrect interpretation of the FTAIA conflicts with the plain language of the FTAIA, as well as important principles that guided Congress in enacting this statute.

First, the language and structure of the FTAIA demonstrate a focus on regulating only "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on *U.S.* commerce *and* that "gives rise to a claim" under the Sherman Act. 15 U.S.C. §§ 6a(1), (2). This language simply does not support the view of the Court of Appeals majority that "conduct" not meeting these criteria—*i.e.*, the wholly foreign transactions at issue in this case, which neither had an "effect" on U.S. commerce nor give rise to a Sherman Act "claim" by Respondents—is nonetheless relevant "conduct" for purposes of the statutory analysis. Rather, the statute requires a focus on the *particular transactions* at issue

2. *See Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003):

> We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive effect itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff before the court.

in the case and whether they meet the requirements of Subsections 1 and 2 of the FTAIA.

Second, Congress recognized the rights of foreign nations to regulate the conditions of competition in their own markets, and indeed the importance of their doing so. This recognition accords with the basic principle of U.S. antitrust jurisdiction that "American antitrust laws do not regulate the competitive conditions of other nations' economies,"[3] and with basic international law limitations on Congress' jurisdiction to prescribe laws with extraterritorial effect—limitations which Congress must be presumed to have respected. The Court of Appeals' interpretation of the FTAIA, however, would make the United States the *de facto* regulator of competition in a vast proportion of international business transactions, even where its own market is not involved in those transactions.

Businesses engaging in international commerce must regularly make decisions and business arrangements that contemplate transactions in markets throughout the world. Businesses view their "conduct" as distinct with respect to each market in which business is transacted, and look to the domestic law governing each market to guide and govern their behavior. However, under the Court of Appeals' interpretation of the FTAIA, a company's transactions in disparate markets can easily and inappropriately be lumped together as constituting the same "conduct." In the modern global economy, where markets throughout the world are typically interrelated, allegations of a "worldwide market" or a "worldwide conspiracy" can be made with respect to

3. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), *citing United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416, 443 (2d Cir. 1945).

virtually any major product or service—and are in fact routinely made by plaintiffs in U.S. antitrust actions involving international markets. However, both from the perspective of Congress' purpose to regulate only restraints of trade with "direct, substantial, and reasonably foreseeable effects" on *U.S. commerce*, and from the realities of how businesses conduct international commerce, the appropriate analysis is the one dictated by the language and structure of the FTAIA—a focus on the particular business transactions that purportedly gave rise to the plaintiffs' claim.

Finally, in enacting the FTAIA Congress sought to adopt a clear and uniform jurisdictional standard that would serve as a benchmark for "businessmen, attorneys and judges as well as our trading partners."[4] Yet the decision of the Court of Appeals would create *uncertainty* for international businesses, who would face the prospect that transactions with no relationship to the United States—transactions which heretofore seemed to have no plausible connection to U.S. competition law—might be judged against complex U.S. antitrust standards, including in some cases a full-blown "rule of reason" analysis. Moreover, U.S. civil actions regarding such transactions would require the parties and the courts to engage in complex and expensive litigation, including burdensome discovery, regarding issues that require an analysis of the competitive conditions of foreign markets. Congress did not intend U.S. courts, and parties to U.S. lawsuits, to expend their resources making determinations on issues far more suited to the courts and laws of the jurisdictions that were directly impacted by the transactions at issue.

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4. H.R. Rep. No. 97-686 (1982), *reprinted at* 1982 U.S.C.C.A.N. 2487, at 2488.

Accordingly, *amicus* urges the Court to reverse the decision of the Court of Appeals.

ARGUMENT

The Court of Appeals majority incorrectly based its ruling that the foreign transactions at issue in this case are within the subject matter jurisdiction of U.S. antitrust laws and courts on an overly broad view of the relevant "conduct"—*i.e.*, "an international price-fixing conspiracy among the vitamin companies," as well as *every single sales transaction worldwide* purportedly affected by that conspiracy. However, this view conflicts with the language of the FTAIA; with Congress' manifest purpose to regulate only conduct with "direct, substantial, and reasonably foreseeable effects" on U.S. commerce, so that U.S. laws and courts do not become the regulators of competition in all the world's markets; and with the way that businesses in international commerce normally view their own "conduct" and anticipate the competition laws that will apply to that conduct. Consistent with these principles, the natural and correct reading of the FTAIA is that courts should focus on the *particular transactions* that allegedly gave rise to the injuries of which plaintiffs in the case in question complain.

I. The Court Of Appeals Inappropriately Ignored The Focus Of The FTAIA's Language And Structure On Regulating Only Transactions That Affect U.S. Commerce.

The Court of Appeals majority dispensed with the critical issue of the "conduct" relevant to its jurisdictional analysis under the FTAIA in a single paragraph. Purporting to follow the views of the Second Circuit in *Kruman*[5] and the Fifth Circuit in *Den Norske*,[6] the majority agreed with Respondents that the relevant conduct was the alleged "massive international cartel, exercising global market power." *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003).[7] The majority accepted, without analysis, that this "conduct" had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, thus meeting the requirements of Subsection 1 of the FTAIA. *Id.*; 15 U.S.C. § 6a(1). The majority concluded that the only remaining issue was to determine whether the requirements of Subsection 2 of the FTAIA were met, *i.e.*, whether "such effect gives rise to a claim" under the substantive provisions of the Sherman Act. 315 F.3d at 344; 15 U.S.C. § 6a(2). According to the majority, the requirement of Subsection 2 is satisfied if the "conduct's harmful effect on United States commerce . . . give[s] rise to 'a claim' by someone, even if not the foreign plaintiff before the court." 315 F.3d at 341.

5. *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003).

6. *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

7. In so holding, the majority dismissed Petitioners' contention that the relevant conduct was "solely the market transactions between them and the foreign plaintiffs overseas." 315 F.3d at 344.

The majority's analysis conflicts with the structure and language of the FTAIA. Subsections 1 and 2 of the FTAIA *define* the "conduct involving trade or commerce . . . with foreign nations" to which the Sherman Act applies. Subsection 1 of the FTAIA specifies that this conduct must have had the requisite effect on U.S. commerce. As the district court observed in the *Copper* case, the statute "is explicit in stating that it is the *effect* of the conduct that is the focus of Congress's concern."[8] In addition, Subsection 2 specifies that it is the Sherman Act *claim* that forms the basis of the FTAIA's jurisdictional test. Reading the FTAIA as a unified whole, the statute's concern is with reaching "conduct" that satisfies both of these criteria. It is simply inconsistent with this language to read the relevant "conduct" as encompassing a purported "international cartel" without reference to the *particular business transactions* that purportedly gave rise to the "effect" on U.S. commerce and the "claim" at issue in the case. It is even more erroneous to conclude, as the Court of Appeals did, that transactions that had *no* effect on U.S. commerce, and gave rise to *no* Sherman Act claim, nonetheless constituted relevant "conduct."

In the district court opinion in *Kruman*, Judge Kaplan explained persuasively that the word "conduct" in the opening clause of the FTAIA must be read with reference to "[t]he precise acts that caused injury" in the case, *i.e.*, "the imposition of charges for auction services at levels determined or affected by the illicit agreement." *Kruman v. Christie's Int'l plc*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001), *rev'd*, 284 F.3d 384 (2d Cir. 2002). Judge Kaplan held that a

8. *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 883 (W.D. Wis. 2000), *rev'd*, *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 840 (7th Cir. 2003), *reh'g and reh'g en banc denied*, May 28, 2003.

broad reading of "conduct," without reference to the plaintiff's injury, would obscure "the real issue"—*i.e.*, whether U.S. antitrust laws provided a remedy for the injuries in *that case*. *Id.* at 625-26. On the facts before him, Judge Kaplan held that the FTAIA did *not* permit a remedy in U.S. courts, under U.S. laws, for those injuries, because the "precise acts" giving rise to those injuries did not relate to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce:

> [I]t would be appropriate for the United States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonably foreseeable effects here that caused the injuries to be remedied.

Id. at 626.[9]

The Fifth Circuit, as well as the dissenting opinion in this case by Judge Henderson, used different reasoning to reach a conclusion consistent with Judge Kaplan's view. Rather than focusing on the identity of the relevant "conduct," these interpretations focused on the meaning of the term "claim" in subsection 2. Judge Henderson correctly concluded that the "more natural" reading of the statute is

9. Judge Kaplan viewed this interpretation as "a straight forward application of the fundamental notion, widely respected by U.S. courts, of prescriptive jurisdiction." 129 F. Supp. 2d at 626. He stated that "[t]he power of the United States to prescribe a rule of conduct for extraterritorial transactions, its prescriptive jurisdiction, depends . . . on those transactions having a substantial effect within U.S. territory." *Id.*

that "the phrase 'gives rise to a claim' refers to the claim advanced by the plaintiff in the action before the court." 315 F.3d at 360 (Henderson, J., dissenting). Similarly, the Fifth Circuit in *Den Norske* held that "the FTAIA requires more than a 'close relationship' between the domestic injury and the plaintiff's claim; it demands that the domestic effect 'give rise' to the claim." 241 F.3d at 427. Each of these analyses mandates that the court focus on the precise claims at issue in the case and the transactions and purported injuries relating to those claims. If those claims do not relate to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by Subsection 1 of the FTAIA, there is no U.S. subject matter jurisdiction.

The views of Judge Kaplan, Judge Henderson, and the Fifth Circuit—as well as other district courts that have interpreted the FTAIA[10]—are complementary, and are more faithful to the language and intent of the statute than that of the majority in this case. Whether the issue is tied to the definition of "conduct" or the meaning of the word "claim," both approaches recognize that the jurisdictional test of the FTAIA must relate to the transactions that allegedly injured the plaintiff *before the court*. The analysis must take into account whether *that* "conduct" relates to a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and whether *that* "conduct" gives rise to a "claim." Failure to test that "conduct"—those transactions—against the requirements of the FTAIA would ignore the clear purpose of Subsections 1 and 2: to determine what "conduct" is subject to the Sherman Act, and what is not.

10. *See Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704-07 (E.D. Pa. 2001); *Copper*, 117 F. Supp. 2d at 883.

II. The Court Of Appeals' Interpretation Of The FTAIA Would Make The United States The Regulator Of Competition In The World's Markets, Contrary To Congress' Intent.

The view of the Court of Appeals majority is not only inconsistent with the language of the FTAIA, it also conflicts with the fundamental tenet of U.S. antitrust jurisdictional analysis that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), *citing United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416, 443 (2d Cir. 1945). Congress clearly recognized this principle and incorporated it into the FTAIA. However, if the ruling of the Court of Appeals is allowed to stand, the United States will indeed become the regulator of the competitive conditions of markets throughout the world. That result would impose a massive burden on international businesses, would raise havoc with the antitrust regimes enacted by some 75-100 of the United States' trading partners and allies in recent years, and in fact would likely exceed the limits of Congress' jurisdiction to prescribe laws affecting the interests of other nations.

In enacting the FTAIA, Congress did not set out to transform U.S. antitrust law into a competition regime for the entire world. To the contrary, one of the two basic purposes of the FTAIA was to clarify *and limit* which business transactions were subject to the jurisdiction of U.S. laws and courts. The House Report states unambiguously that "[t]he intent of the Sherman and FTC Act amendments in H.R. 5253 is to *exempt* from the antitrust laws conduct that does not have the requisite domestic effects." 1982 U.S.C.C.A.N. at 2495 (emphasis added). The same

section of the House Report emphasized that victims of *U.S. domestic* price-fixing, whether domestic or foreign, should be able to recover for their injuries—thus, "[f]oreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do." *Id.* at 2495 (emphasis added). But with respect to foreign markets, the report acknowledged the "increased sensitivity of other nations to antitrust considerations and cartel activity" and the need to "encourage our trading partners to take more effective steps to protect competition in their markets." *Id.* at 2499.

Testimony throughout the legislative process emphasized the need to respect principles of international comity and restrain any overly aggressive extraterritorial effect of the antitrust laws. Chairman Rodino, one of the sponsors of the FTAIA in the House of Representatives, stated that it was important for Congress to consider legislation "that would provide greater certainty regarding the international scope" of U.S. antitrust laws because of resentment by "many of our closest allies and trading partners" regarding their extraterritorial reach.[11] Former Federal Trade Commission chairman Robert Pitofsky informed the U.S. Senate Judiciary Committee that the FTAIA would limit the subject matter jurisdiction of U.S. antitrust laws in a manner consistent with America's trading partners by recognizing that "transactions which exhaust their competitive consequences in foreign markets should be treated differently than those that have an internal domestic effect."[12] Professor Eleanor Fox told the House

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11. Comments of Hon. Peter W. Rodino, Jr. (chairman) at Hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 1.

12. Prepared statement of Robert Pitofsky, Esq. at hearing on S. 795 before the Comm. on the Judiciary, 97th Cong., June 17, 1981, at 45.

of Representatives that the proposed bill would make clear that "the U.S. antitrust laws do not protect foreign consumers against breakdown of competitive conditions in foreign countries."[13] Professor Fox went on to state that "[w]hile protection of competition in foreign markets may be a worthy objective, it is not our concern. We do not, and should not seek, thus to export American antitrust."[14]

James R. Atwood emphasized in his comments to the House of Representatives that the FTAIA was intended to achieve a rational allocation of antitrust enforcement throughout the world's jurisdictions, based on the location of the markets in which the effects were felt.[15] David N. Goldsweig echoed these observations, testifying that competition law has developed in foreign jurisdictions throughout the world, including Japan, most European countries, Chile, and Korea, and that an amendment to U.S. competition laws such as the FTAIA "would limit unnecessary and unwanted intrusions into matters that should properly be resolved in accordance with the local law and policies of foreign sovereigns."[16]

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13. Testimony of Prof. Eleanor Fox at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 27.

14. *Id.*

15. Prepared statements of James R. Atwood, Esq. at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., April 8, 1981, at 92 (FTAIA "would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States").

16. Testimony of David N. Goldswieg, Esq. at hearing on H.R. 2326 before House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 97th Cong., March 26, 1981, at 36.

The FTAIA's legislative history confirms that, consistent with these principles and the plain language of the statute, Congress intended to regulate only *transactions* with the requisite "direct, substantial, and reasonably foreseeable" effects on U.S. commerce. This emphasis on "transactions," a term used throughout the House Report, is demonstrated in the following passage:

> A *transaction* between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign *transactions* should, for the purposes of this legislation, be treated in the same manner as export *transactions*—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.

1982 U.S.C.C.A.N. at 2494-95 (emphasis added).[17] Thus, Congress contemplated that the "effect" on U.S. commerce be related to the particular transaction giving rise to that effect. If the transaction does not have the requisite

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17. *See also, e.g.*, 1982 U.S.C.C.A.N. at 2487 (FTAIA addresses differences among courts regarding "the proper test for determining whether United States antitrust jurisdiction over international *transactions* exists"); *id.* at 2488 (FTAIA makes Sherman Act inapplicable "to conduct involving trade or commerce with foreign nations, other than import *transactions*, unless there is a 'direct, substantial, and reasonably foreseeable effect' on domestic or import commerce, or the export opportunities of a domestic person."); *id.* at 2490 (FTAIA addresses "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular *transaction*"); *id.* (*Alcoa* test contemplated whether "the international *transaction* was intended to affect domestic commerce and whether it actually did so") (emphases added).

effect, in the words of the House Report, "there should be no American antitrust jurisdiction." *Id.*

This focus on whether a given *transaction* serves as a basis for the subject matter jurisdiction of U.S. courts is the analysis that best comports with Congress' emphasis on regulating conduct with effects on United States commerce, while permitting other nations to develop competition regulations with respect to their own markets. This analysis creates a logical allocation of enforcement responsibility: each jurisdiction is responsible for regulating the "conduct"—*i.e.*, the affected transactions—that have a direct impact on that jurisdiction's markets.

This analysis also corresponds most closely to how businesses view their "conduct" with respect to international commerce, and the competition regimes they expect will apply to their conduct. In a global economy, with the world's markets frequently interlinked and interdependent, businesses often make high-level decisions, agreements, and other actions that account for multiple markets at once. For example, distribution arrangements may fix terms on which a distributor can resell goods in numerous countries. Licensing agreements may cover royalties and other fees in multiple markets. Supply agreements may contemplate the provision of goods from several countries. On a very basic level, a manufacturer—such as Petitioners in this action—may sell goods to multiple countries.

This does *not* mean that a company that does business in multiple countries is engaging in the same "conduct" with respect to each of them. International businesses *always* seek to be aware of differences in their target markets that will have an impact on their business. Such differences can

include competitive conditions, such as whether the market will support higher or lower prices; costs of doing business, such as taxes, fees, and duties; and the applicable regulations—including antitrust laws. These distinctions may warrant differing prices, contract terms, distribution methods, etc. from market to market, and they may not; but separate markets would normally receive individual consideration. From a business perspective, the only logical way to gauge participation in each market is with respect to the specific business transacted in each of them. Similarly, the only practical way for a business to understand the rules that will apply to its conduct in varying markets is by reference to its actual business conducted in each market—namely, the transactions that affect it.

Once the concept of "conduct" is divorced from specific, identifiable business transactions—as the Court of Appeals majority has done in this case—and broadened to the generalized level of global strategic planning, it is possible for nearly any plaintiff involved in international trade to argue that some aspect of a defendant's business planning was global in nature and contemplated business involving the U.S. market. From there, it is but a small step for such a plaintiff to allege that some aspect of that global "conduct" had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, giving rise to a "claim" of someone, somewhere. Indeed, such allegations are now routine in antitrust cases involving alleged international cartels. If such allegations were sufficient to invoke the antitrust subject matter jurisdiction of U.S. laws and courts, this would have precisely the opposite effect of what Congress intended by enacting the FTAIA. It would *extend* jurisdiction to the very conduct that Congress meant to *exempt*—transactions that do not give rise to a "claim" arising from a "direct,

substantial, and reasonably foreseeable effect" on *U.S.* domestic or foreign commerce.

Respondents have placed emphasis on the "global" nature of the vitamins market and of the price-fixing cartel they allege. Respondents' Brief in Opposition to Petitioners' Petition for Writ of Certioriari at 2-5. In essence, this is another way of arguing for the broadest possible view of the "conduct" that Congress sought to regulate. Again, similar characterizations could be made with respect to a vast array of goods and services that are traded internationally, and it is common for plaintiffs to make boilerplate allegations of a "global market" and/or a "global conspiracy" in antitrust cases. However, even where the legislative history of the FTAIA makes reference to "International Cartels," the focus is on addressing such a cartel's "effect of raising domestic prices." 1982 U.S.C.C.A.N. at 2498. Where a cartel has unlawful effects in a foreign territory, the legislative history contemplates encouraging our trading partners to "act under [their] own laws" and "protect competition in their markets." *Id.* at 2498-99. There is certainly no hint of an intention for U.S. courts and U.S. laws to regulate, and provide remedies for, transactions that do not have the requisite effects on *U.S.* commerce—even with respect to a purportedly "global" market or conspiracy. As the Fifth Circuit recognized in *Den Norske*, "[t]he assumed existence of a single, unified, global conspiracy does not relieve [plaintiff] of its burden of alleging that its injury arose from the company's proscribed effects on United States commerce." 241 F.3d at 427 n.24, *citing Matsushita*, 475 U.S. at 584 n.7.

Congress' intention that foreign jurisdictions regulate their own markets in the case of "international cartels" is also consistent with the canon of statutory construction that,

as Judge Hand observed in *Alcoa*, "we are not to read general words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers." *Alcoa*, 148 F.2d at 443. Consistent with this well-established principle, the jurisdiction of Congress to prescribe laws in circumstances affecting the interests of other states is subject to the requirement that such jurisdiction must be "reasonable."[18] *Amicus* wishes to emphasize the *unreasonableness* of the Court of Appeals' interpretation of the FTAIA by considering how the U.S. would view a similar assertion of subject matter jurisdiction by other countries.

If U.S. businesses were haled into foreign courts in connection with treble-damage class action lawsuits under foreign law concerning product sales that took place entirely within the United States, involving a U.S. buyer and a U.S. seller, the domestic business community and this nation's political leadership would take vigorous exception. More extreme possibilities present themselves: in an industry where products are sold throughout the world, U.S. (and foreign) businesses could find themselves facing litigation regarding those same U.S. transactions in dozens of courts throughout the world. Indeed, those U.S. businesses could face liability for those transactions under foreign laws *even if they were considered legal under U.S. law*. Under the approach followed by the Court of Appeals, courts in each of those countries would only have to satisfy themselves that some transaction with a "direct, substantial, and reasonably foreseeable effect" on that country's commerce gave rise to a "claim" under that country's laws.

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18. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

If that scenario would violate the principle of "reasonableness" under international law—and there is every reason to think that it would—the Court of Appeals' interpretation of the FTAIA would do so as well. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). Under this principle, the interpretation of the Court of Appeals majority should be rejected.

III. The Decision Of The Court Of Appeals Creates Uncertainty And The Possibility Of Conflicting Regulation For Businesses In International Commerce, And Is Not Administrable As A Jurisdictional Test.

The Court of Appeals majority's interpretation of the FTAIA also conflicts with another basic Congressional purpose in enacting that statute. Congress intended the statute to provide "a clear benchmark" for "businessmen, attorneys and judges as well as our trading partners." 1982 U.S.C.C.A.N. at 2488. The legislative history emphasizes that such clarity is necessary:

> First, as a practical matter, businessmen and antitrust practitioners often consider American antitrust law an unnecessarily complicating factor in a fluid environment in which prompt decisionmaking may be critical. . . . A single, clear standard can reduce the amount of legal research and analysis that will be necessary to make an

> accurate prediction to whether United States antitrust laws 'indicate problems.'

Id. at 2491. Congress recognized that this need also extended to the administrability of court proceedings. The legislative history states that "[a] single standard will allow consistent precedent to develop by providing more definite touchstones to guide the parties and the courts." *Id.*

Notably, Congress recognized that principles serve the needs not only of U.S.-based businesses and courts, but also of "our trading partners" and "the parties" in Federal court actions. Thus, foreign entities such as *amicus* ICC and its members are expressly within the group that Congress sought to benefit by enacting a clear, consistent standard under the FTAIA.

From the perspective of businesses involved in international trade, the Court of Appeals' interpretation of the FTAIA is emphatically not clear, not consistent, and not administrable as a jurisdictional test. In fact, this standard appears to require businesses considering whether to engage in international business transactions to navigate all the complexities of U.S. antitrust analysis—possibly requiring as-yet-unknown facts—to determine whether some person could, potentially, assert a "claim" arising from a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Moreover, if it is determined that such a "claim" might be possible, businesses would then apparently need to analyze whether their conduct in *every market in which they sell* complies with *U.S.* antitrust law. The requirement of such an analysis would be just the kind of "unnecessarily complicating factor" in making business decisions that Congress sought to prevent by passing the FTAIA—

particularly for foreign-based businesses, such as the members of *amicus* ICC, for whom parsing the nuances of federal antitrust law presents a particular challenge.

Furthermore, the jurisdictional test adopted by the Court of Appeals would be exceedingly difficult to administer in the context of an actual dispute. U.S. courts, and parties to actions in those courts, would be required to litigate such complex issues as:

- What person is alleged to have a "claim" arising from a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce;

- Whether and how the validity of that "claim"—which might involve only persons not before the court—can be established;

- Whether there is a sufficient relationship between that "claim" and the foreign transactions at issue in the case;

- Whether the "conduct" with respect to the *foreign market* constitutes an "unreasonable" restraint of trade under *U.S.* laws;

- Whether the "fact of injury" could be established with respect to the plaintiff *in the foreign market*; and

- If so, the appropriate measure of damages *in the foreign market*.

It would mark a radical departure from prior Sherman Act jurisprudence for U.S. courts to be required to make such determinations about the competitive conditions of foreign nations regarding purely foreign transactions. The complexity of such determinations also would do nothing to assist international businesses in determining whether U.S. antitrust law might apply to a given transaction. Indeed, the only thing it *would* ensure is that foreign businesses can and will be haled into U.S. courts based on allegations that might be made in nearly any industry involving international trade. This would frustrate, not further, Congress' purpose to clarify the extraterritorial reach of U.S. antitrust laws.

Finally, the Court of Appeals' interpretation of the FTAIA would create inconsistencies in markets throughout the world, because it could in some cases subject different actors in the same market, at the same time, to significantly differing legal standards. While many jurisdictions throughout the world have borrowed some concepts and standards from U.S. antitrust law, no jurisdiction has adopted the U.S. competition regime wholesale. Acts that are prohibited under U.S. competition laws may be permitted under the laws of another country.[19] Under the Court of Appeals' interpretation of the

19. To take one example, the Republic of Korea's prohibitions against "Unfair Collaborative Acts," set forth in Article 19(1), are subject to numerous exceptions under Article 19(2), including actions "authorized as satisfying the requirements determined by Presidential Decree" where conducted for the purpose of "1. Industry rationalization; 2. Research and technology development; 3. Overcoming economic depression; 4. Industrial restructuring; 5. Rationalization of trade terms and conditions; or 6. Enhancement of competitiveness of small and medium enterprises." Monopoly Regulation and Fair Trade Act of Korea §§ 19(1),(2), *available at* <http://ftc.go.kr/data/hwp/monopoly.doc>; *see also* I ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001), at 38.

FTAIA, a company whose "conduct," broadly defined, had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce giving rise to some "claim" would be subject to *U.S.* antitrust laws with respect to its transactions throughout the world. By contrast, a competitor participating in those same markets, but whose "conduct" did not have the requisite effects on U.S. commerce, would presumably be regulated only by the laws of the jurisdictions in which they transacted business, not the laws of the U.S.

The text and history of the FTAIA contain no suggestion that Congress expected different actors in the same market to be subject to differing competition regimes. Rather, the opposite is true: the FTAIA's provisions concerning exports were enacted to assure U.S. companies that they *would not* be subject to potentially stricter U.S. antitrust laws when they were conducting business in foreign markets, which could place those companies at a disadvantage compared to companies they are competing with not subject to U.S. law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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No. 03-6821

IN THE

Supreme Court of the United States

DAVID NELSON,

Petitioner,

—v.—

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF LAURIE DILL, M.D., FRANK GOGAN, M.D., GARY KALKUT, M.D., MARK C.D. MITCHELL, M.D., JANE MOBLEY, M.D., & WILLIAM WINTERNITZ, M.D. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a medical doctor.[2] Our practices require us to be familiar with current practices in obtaining intravenous access, including the surgical procedures necessary to gain access to central veins.

The underlying dispute in this matter concerns the State of Alabama's intent to utilize a medical procedure known as a "cut-down" in a non-surgical setting in order to gain access to a functional vein, and thus enable the Petitioner's execution by lethal injection. We understand that the Court is concerned principally with how a challenge to such a procedure may be brought, and we offer no view on that question. We do, however, write briefly to set forth current medical standards for gaining intravenous access in individuals who have compromised veins.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief in letters on file with the Clerk.

[2] Laurie Dill, M.D., practices internal medicine in Montgomery, Alabama, and has been a physician for 17 years. Frank Gogan, M.D., has practiced general medicine in Montogmery, Alabama, and has been a physician for 23 years. Gary Kalkut, M.D., has practiced internal medicine in New York City for 20 years, and has several years of experience in providing medical services to prisoners. Mark C.D. Mitchell practices emergency medicine in Daphne, Alabama, and has been a physician for 21 years. Jane Mobley practices internal medicine in Birmingham, Alabama, and has been a physician for 17 years. William Winternitz practices internal medicine in Tuscaloosa, Alabama, and has been a physician for 26 years.

STATEMENT

This matter arises from an order of the Alabama Supreme Court that the Petitioner, David Nelson, be executed by lethal injection. In the weeks leading up to Nelson's October 9, 2003 execution date, the parties became aware that Nelson's poor vein structure made peripheral venous access in his hands and arms impracticable. Thereafter, the Warden of Holman Prison informed Nelson and his counsel that in order to gain adequate access, the State would attempt a cut-down procedure to locate an adequate vein in Nelson's upper thigh or arm.

Shortly before the scheduled execution, Nelson filed the instant suit, asserting that the State's employment of a cut-down procedure, in a prison setting, and under the circumstances outlined by the Warden, was both reckless because of the irresponsible manner in which the State was proposing to conduct the procedure, and unnecessary because of less painful, less traumatic and safer alternatives.

Nelson supported his claims with the affidavit of a Board Certified anesthesiologist, Mark Heath, M.D. Dr. Heath asserted the cut down is a potentially risky surgical procedure. He described the procedure as painful and disturbing, specifically the smoke, odor, as well as the buzzing and sizzling noises that can result from cautery. JA 32. Dr. Heath indicated that cut-down procedures are usually performed under deep sedation, with the administration of potent intravenous analgesics (drugs that block pain), because otherwise they would be extraordinarily disturbing and distressing. *Id.* Finally, he asserted that a cut-down procedure is a procedure that should be performed only by a physician or practitioner who is specifically trained and credentialed to perform that procedure. JA 32-33. Moreover, given the near uni-

versal adoption of superior techniques, Dr. Heath explained there is no comprehensible reason for the State of Alabama to employ the cut-down procedure to obtain intravenous access. JA 37.

The State countered with affidavits from the Warden and a medical doctor, Marc Sonnier. J.A. 90-94. The Warden explained that the State was now prepared to use the cut-down procedure in the event that access to veins in the thigh and neck proved unavailable, and that an unidentified medical doctor would perform any of the needed procedures. J.A. 93-94. He further stated that if the cut-down procedure was utilized, Nelson would be given local anesthesia. J.A. 94. Dr. Sonnier explained that he was familiar with each procedure outlined by the Warden and that none of the procedures, if performed in the prison setting, would pose any significant risk to Nelson. J.A. 90-91.

The parties disagree profoundly upon the nature of the cut-down procedure and adequacy of the state's plan to employ it. We offer this brief to advise the Court on these areas of dispute.

ARGUMENT

From our experience and training, the disputed issues do not present close questions. The Petitioner has fully and fairly described how current medical practice views the appropriate use of cut-down procedures, and why the State's hastily assembled plan to utilize it is sharply inconsistent with such practice.

1. The Cut-Down Procedure is an Invasive Surgical Procedure That Requires Appropriate Safeguards

The cut-down procedure is an accepted medical procedure when conducted in the correct setting, by a properly trained physician, and where less intrusive procedures are unavailing. "Venous cutdown is contraindicated when less invasive alternatives exist or when excessive delay would be required for the procedure to be performed." Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

"Performance of a rapid, effective cutdown can be achieved only by thorough knowledge of the procedure and attention to its many details." *Id.* There are a host of reasons why cut-down must be performed in the correct setting, and by an adequately trained physician. The ultimate objective of the procedure is to go deeply into an arm, leg, or chest to locate large, uncompromised veins. "Detailed knowledge of anatomy is imperative to the success of this procedure." *Id.* Moreover, "[t]he choice of a particular vein should be governed by its accessibility and size and by the physician's experience and training." *Id.* Skill and practice are especially important in cut-down procedures, because they require cutting through tissue, fat, and muscle; such deep invasion breaches small arteries and causes bleeding.

Given the nature of the procedure, there are numerous possible complications that the physician must take precautions to avoid. *See id.* Whenever deep incisions are made, there is a clear risk of rupturing large blood vessels. Such a breach can cause a severe hemorrhage. When the procedure is used in the neck area, two additional risks arise: cardiac dysrhythmia, an abnormality of

the electrical activity of the heart, and pneumothorax, which induces the sensation of suffocation. *See Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm>. Cutdown also causes significant physical pain and obvious psychological and emotional stress. "An indirect but significant complication is deterioration of an unstable patient during a time-consuming cutdown attempt." Steven C. Dronen and Patricia Lanter, *supra.*

Because of these and other risks,[3] it is necessary that this procedure take place in a hospital or otherwise appropriate medical setting. All of the complications that can arise require ready access to equipment found only in the hospital setting, and to trained staff who can competently assist the physician.[4] In the absence of sufficient, qualified, available staff and other doctors, a physician would lack the assistance necessary to deal adequately with complications as they arose.

It is also accepted practice that cut-down procedures should be performed by physicians who have specialized

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[3] The complications of venous cut-down include local hematoma and infection, sepsis, phlebitis, embolization, wound dehiscence, and injury to associated structures. Steven C. Dronen and Patricia Lanter, *Venous Cutdown*, *in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998).

[4] For instance, acceptable protocol requires that "[i]f a physician is unable to insert a catheter after three attempts, he or she should seek help rather than continue to attempt the procedure. The incidence of mechanical complications after three or more insertion attempts is six times the rate after one attempt." David C. McGee, M.D., and Michael K. Gould, M.D., *Preventing Complications of Central Venous Catherization*, 348 N. ENGL. J. MED. 1123, 1128 (2003).

training in the area.[5] "As with most medical procedures, the level of experience of the physician reduces the risk of complications." McGee and Gould, at 1128. This is not a procedure that all physicians would feel comfortable performing, and the risk of complication or error is significantly lessened when skilled, trained physicians perform the procedure.[6] "[Even] insertion of a catheter by a physician who has performed 50 or more catherizations is half as likely to result in a mechanical complication as insertion by a physician who has performed fewer than 50 catherizations." McGee and Gould, at 1128.

Moreover, to lessen the pain, trauma and anxiety of the patient, it is also accepted practice that a general anesthesia or deep sedation be utilized. Many, if not most patients are profoundly traumatized by the sight of copious amounts of their own blood, and by the pungent odors that arise from such procedures as cautery.

We believe that any competent physician, if asked to support the State's plan to resort to the cut-down under the instant conditions—without the guarantee of adequate equipment, a certified and trained practitioner to perform

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[5] Emergency medicine, surgery, anesthesiology and cardiology are the four areas of medicine most likely to provide doctors with experience in cut-down procedure. Doctors outside of these specialties may well have never performed a cut-down.

[6] Case law includes numerous examples of how inexperience and lack of skill in cut-down procedure can lead to devastating pain and suffering in patients. *See, e.g., Crawford County State Bank v. Grady*, 514 N.E. 2d 532 (Ill. App 4 Dist. 1997) (multiple cut downs on leg cause swelling and eventual gangrene in foot; foot is later amputated); *Edwards v. Our Lady of Lourdes Hosp.*, 526 A. 2d 242 (N.J. Super. A.D. 1987) (after cut down, inexperienced physician inserts catheter in artery, not vein; right leg is later amputated at the hip after gangrene develops); *Barrette v. Hight*, 230 N.E. 2d 808 (Mass. 1967) (during cut down by inexperienced doctor, lateral nerve in arm is severed and median nerve is damaged).

the procedure, licensed medical support staff, and a surgical environment, and without having first ruled out the safer, far less painful preferred procedures—would refuse. For all of the foregoing reasons, a cut-down procedure should not be utilized in a prison environment unless it is fully equipped to provide safe surgery.

2. Less Intrusive and Safer Procedures Are Available

Modern medicine provides the State of Alabama with plainly superior options. Indeed, we believe most trained physicians, in the absence of normal peripheral venous access, would only resort to a cut-down after definitively ruling out the other, safer, less invasive procedures.

These preferred procedures are well established. "[A] method of rapid fluid infusion that is technically easier and faster than venesection is the percutaneous insertion of large-bore introducer devices into the subclavian, internal jugular, or femoral veins." Steven C. Dronen and Patricia Lanter, *Venous Cutdown, in* ROBERTS: CLINICAL PROCEDURES IN EMERGENCY MEDICINE, (James R. Roberts & Jerris R. Hedges eds., 3d. ed. 1998). "Venous cutdown is only indicated where more rapid and less invasive venous access is not obtained. Options include cannulation of the femoral vein or neck veins . . . ." Tracey Tay, *Venous Cutdown, in* The LIVERPOOL HOSPITAL MANUAL OF TRAUMA CARE (Scott K. D'Amours et al. eds., 6th ed. 2002). Medical professionals throughout the country are familiar with these preferred procedures, the most common of which, percutaneous central line placement, utilizes a hollow needle and a wire to secure access. Because percutaneous techniques are far less invasive, they carry none of the risks of the cut-down procedure, and are far less painful, less traumatic, and easier for the physician to master. As a result, "[p]ercutaneous alternatives should be

exhausted or prohibited prior to contemplating a peripheral cutdown." Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 808 (1992).

3. The Record Fails To Show That A Suitable Plan Is In Place Or That Appropriate Alternatives Have Been Considered

While the record shows that Nelson requested the State's plan for addressing Nelson's condition, and asked that it consider alternatives to the cut-down procedure, the record strongly suggests that no suitable plan exists and that no such consideration was given. The Warden's affidavit explains clearly that the State's plan, which does not include percutaneous central line placement, was conceived after Nelson brought the instant litigation, and that as yet unnamed medical personnel are prepared to carry out the procedures. J.A. 90-91.

There is nothing in this record that suggests that percutaneous central line placement would fail. Given this fact, there is no medical reason to utilize the significantly more dangerous cut down procedure.[7]

[7] "A peripheral venous cutdown is not the primary consideration in most patients who require vascular access. It is specifically indicated, however, in patients who lack adequate peripheral access *and* who are *not candidates for percutaneous central venous access*." Bruce B. McIntosh, MD, and Scott A. Dulchavsky, MD, *Peripheral Vascular Cutdown*, 8 (4) CRIT. CARE CLIN. 807, 807 (1992) (emphasis added). "*If an intravenous line cannot be established percutaneously*, and *if a subclavian (or internal jugular) catherization is not appropriate* to the clinical situation, a venous cutdown is indicated . . . ." Sam C. Eggertsen, MD, *Teaching Venous Cutdown Techniques with Models*, 16 (6) J. FAM. PRACT. 1165, 1165 (1983) (emphasis added). "Venous cut down is an emergency procedure . . . [and an] effective option for venous access in multisystem trauma and hypovolemic shock, *when peripheral cannulation becomes difficult or impossible*." *Venous Cut Down: A Quicker and Safer Technique* (visited Jan. 20, 2004), The Royal College of Surgeons, Surgical Knowledge and Skills Website <http://www.edu.rcsed.ac.uk/operations/op4.htm> (emphasis added).

4. The Record Does Not Establish That Dr. Sonnier Is Competent To Perform Cut-Down

Finally, while the Warden did not confirm that Dr. Sonnier would supervise or conduct the invasive procedures outlined in their affidavits, we note that there are significant reasons to question whether Dr. Sonnier possesses the requisite experience and training adequately and safely to perform a cut-down procedure. At no point does he describe his background and training in sufficient detail to establish that he possesses such training and experience. Our confidence in his experience is not strengthened by his claim that he has previously attached an intravenous line "to the external carotid vein located in the neck," and his assertion that the saphenous vein is in the arm. J.A. 91. Humans do not have an external carotid vein in their neck nor a saphenous vein in their arm. GRAYS ANATOMY, at 816-26; 845-50 (Carmine D. Clemente ed., 30th ed. 1984). Further, it appears that it was the Warden, and not Dr. Sonnier, who determined the procedures that would be used. The selection of a method to gain access to a non-compromised vein should be made by the doctor, and only after he or she has performed a full examination of the patient. There is no evidence that Dr. Sonnier has performed such an examination.

Conclusion

If a special medical procedure is necessary to locate a functional vein, the procedure should comply with accepted medical pra tice. The deficient plan proposed by the State of Alabama in this instance falls far short of those practices.

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